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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION,
a national trade association;
et al.,

NO. CIV. S-02-1138 FCD/JFM

Plaintiffs,

v.

MEMORANDUM AND ORDER

BILL LOCKYER, in his official
capacity as Attorney General
of the State of California, et
al.,

Defendants.

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This matter is before the court on plaintiffs' motion for a preliminary injunction enjoining the implementation of California Civil Code section 1748.13 (hereinafter "§ 1748.13"), set to become law on July 1, 2002.¹ The court heard oral argument on the matter on June 28, 2002.

¹ All portions of the statute are to become law on July 1, 2002, except for provisions of subdivision (a) (3) (C), which are to become operative on January 1, 2003.

1 For the reasons stated below, the court does not render a
2 final decision on the motion at this time. Rather, a continued
3 hearing on the motion will be held on November 8, 2002 at 10:00
4 a.m. in Courtroom 2; the parties will be permitted to conduct
5 discovery pertaining to the motion until August 30, 2002.
6 Pending the further hearing on the motion, the court enjoins the
7 enactment of the statute.

8 **BACKGROUND**

9 Section 1748.13 contains language and information that must
10 be placed on the billing statements credit card issuers provide
11 their cardholders. The statute applies to all credit cards², but
12 differentiates "retail credit cards" as a separate category.³
13 § 1748.13(b) (3).

14 According to the State, the statute was designed to provide
15 credit card users with warnings about the length of time and
16 total amount of cost a cardholder will incur if (s)he repays the
17 outstanding balance on a credit card by remitting only the
18 minimum payment on each periodic bill. The statute requires
19 credit card issuers to include the warnings contemplated by the
20 statute except in billing cycles where they either: (1) require a
21 minimum payment of at least 10% of the cardholder's outstanding
22 balance or (2) do not impose finance charges. § 1748.13(c) (1)-
23 (2).

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25 ² Credit cards are defined under § 1748.12 as "[a]ny
26 card, plate, coupon book, or other single credit device existing
for the purpose of being used from time to time upon presentation
to obtain money, property, labor or services on credit."

27 ³ Retail credit cards are those that are "[i]ssued by or
28 on behalf of a retailer, or a private label credit card that is
limited to customers of a specific retailer." 1748.13(b) (3).

1 When credit card issuers do not meet these exceptions, they
2 must provide the warnings and information contemplated by the
3 statute to cardholders. First, each cardholder's bill must
4 display two messages, on the front of the first page, in
5 capitalized type that is at least 8-point size. The first
6 message is required and states, "Minimum Payment Warning: Making
7 only the minimum payment will increase the interest you pay and
8 the time it takes to repay your balance." § 1748.13(a)(1). The
9 second message is also required, but allows the credit card
10 issuer to decide between two optional methods of presenting
11 further warnings and distributing information required by the
12 statute. The credit card issuer must decide to provide one of
13 the following options.

14 The first option is under § 1748.13(2)(A). It provides that
15 immediately after the Minimum Payment Warning, the credit card
16 issuer must provide a short statement that describes the time it
17 would take and the total cost to a cardholder if (s)he paid off
18 balances of \$1000, \$2500, and \$5000 by paying only the minimum
19 payment, if the billing was based on an annual percentage rate of
20 17% and a minimum payment of 2% of the bill or \$10 (whichever was
21 greater). Credit card issuers can satisfy the requirements of
22 this option if they provide the same information for the three
23 specified balance amounts at the annual percentage rate and
24 required minimum payment which are applicable to an individual
25 cardholder's account. § 1748.13(a)(1)(A)(i).⁴ If the credit
26 card issuer chooses to provide this message, then immediately

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28 ⁴ Similar requirements are imposed on retail credit card
issuers. § 1748.13(a)(2)(A)(ii).

1 following the required wording, it must provide the following
2 written statement: "For an estimate of the time it would take to
3 repay your balance, making only minimum payments, and the total
4 amount of those payments, call this toll-free number: (Insert
5 toll-free telephone number)." § 1748.13(a)(3)(A). The statute
6 requires that the toll-free number be available between the hours
7 of 8 a.m. and 9 p.m. Pacific Standard Time, seven days a week,
8 and provide consumers with the opportunity to speak to a person,
9 rather than a recording, from whom the individualized account
10 information discussed above can be obtained. § 1748.13(a)(3)(B).

11 The second option, under § 1748.13(2)(B), allows a creditor
12 to print a written statement on the front of the first page of
13 the bill that provides individual, "customized" information to
14 the cardholder. This information would indicate an estimate of
15 the number of years and months and the approximate total cost to
16 pay off the entire balance due on an account if, based on the
17 terms of the credit agreement, the cardholder were to pay only
18 the minimum amount due for each bill. If the credit card issuer
19 chooses this option, the bill must also provide the cardholder
20 with either a referral to a credit counseling service or the
21 "800" number for the National Foundation for Credit Counseling
22 (through which the cardholder can be referred to credit
23 counseling services in, or closest to, the cardholder's county of
24 residence).⁵ A credit card issuer is *required* to use this option
25 if the cardholder has not paid more than the minimum payment for

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27 ⁵ If the credit card issuer employs this option and the
28 account is based on a variable rate, the credit card company may
make disclosures based on the rate for the entire balance as of
the date of the disclosure and indicate that the rate may vary.

1 6 consecutive months after July 1, 2002. § 1748.13(a)(2)(B).

2 Additionally, the statute mandates that the Department of
3 Financial Institutions ("DFI") establish a detailed table
4 illustrating the approximate number of months and approximate
5 total cost to repay an outstanding balance if the consumer pays
6 only the required minimum monthly payments and if no other fees
7 are incurred. § 1748.13(a)(3)(C). These tables must consider: a
8 significant number of interest rates (§ 1748.13(a)(3)(C)(i)); a
9 significant number of different account balances (with the
10 difference between amounts considered no greater than \$100)
11 (§ 1748.13(a)(3)(C)(ii)); a significant number of different
12 payment amounts (§ 1748.13(a)(3)(C)(iii)); and that only minimum
13 monthly payments are made with no additional charges or fees
14 incurred on the account. § 1748(a)(3)(C)(iv).

15 The information developed by the DFI can be referenced when
16 a cardholder calls the toll free line and requests information on
17 how long and at what cost they would pay off a balance using a
18 minimum payment, or when the credit card issuer is required to
19 disclose this information to cardholders who have paid the
20 minimum for 6 consecutive months. However, credit card issuers
21 are not allowed to include the full chart with a billing
22 statement to satisfy their obligations under the statute.
23 § 1748.13(a)(3)(D).

24 By this lawsuit, plaintiff seeks to enjoin the commencement
25 and enforcement of this statute on the following grounds: (1)
26 under the Supremacy Clause, the statute is preempted by the
27 National Bank Act of 1864 ("NBA"), 12 U.S.C. §§ 21 *et seq.*,
28 and/or the Federal Credit Union Act ("FCUA"), 12 U.S.C. §§ 1751

1 et seq.; (2) the statute violates the dormant commerce clause;
2 and (3) the statute violates 42 U.S.C. § 1983 because it violates
3 either the National Bank Act, the Federal Credit Union Act or the
4 Constitution. Compl., filed May 24, 2002, ¶¶ 3, 10.

5 **STANDARD**

6 To prevail on its request for a preliminary injunction,
7 plaintiff must show either "(1) a combination of probable success
8 on the merits and the possibility of irreparable injury or (2)
9 that serious questions are raised and the balance of hardships
10 tips sharply in its favor." Dollar Rent A Car of Wash., Inc. v.
11 The Travelers Indem. Co., 774 F.2d 1371, 1374-75 (9th Cir. 1995)
12 (quoting Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football
13 League, 634 F.2d 1197, 1201 (9th Cir. 1980)). "Under either
14 formulation of the test, plaintiff must demonstrate that there
15 exists a significant threat of irreparable injury." Oakland
16 Tribune, Inc. v. Chronicle Publ'g Co., Inc., 762 F.2d 1374, 1376
17 (9th Cir. 1985). In the absence of a significant showing of
18 irreparable injury, the court need not reach the issue of
19 likelihood of success on the merits. See id. Unexplained delay
20 in seeking preliminary injunctive relief may weigh against claims
21 that plaintiff faces "irreparable injury." Miller v. Cal. Pac.
22 Med. Ctr., 991 F.2d 536, 544 (9th Cir. 1993).

23 **ANALYSIS**

24 The two primary issues before this court are: (1) whether
25 the NBA or the FCUA preempts § 1748.13; and (2) whether § 1748.13
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1 violates the dormant commerce clause.⁶ Plaintiffs contend that
2 the California law is unduly burdensome, so much so that it
3 impermissibly infringes upon the banks' federally granted right
4 to conduct business efficiently. They also allege that the
5 burdens of § 1748.13 on interstate commerce are so great, and its
6 benefits to the State so minimal, that it violates the dormant
7 commerce clause.

8 In determining whether the NBA preempts state law, courts
9 have articulated a general rule, which contains an exception:

10 the rule being the operation of general state laws
11 upon the dealings and contracts of national banks;
12 the exception being the cessation of the operation
13 of such laws whenever they expressly conflict with
14 the laws of the United States, or frustrate the
15 purpose for which the national banks were created,
16 or impair their efficiency to discharge the duties
17 imposed on them by the law of the United States.
18 First Nat'l Bank in St. Louis v. Missouri, 263
19 U.S. 640, 656 (1924).

20 Thus, the core question before this court is whether § 1748.13
21 has so onerous an effect upon credit card issuers that it ceases
22 to operate as a general state law upon "the dealings and
23 contracts of national banks" and instead frustrates the purpose
24 for which the national banks were created.

25 Under the FCUA, 12 C.F.R. § 701.21(b)(1) provides that the
26 FCUA preempts "any state law purporting to limit or affect
27 . . . terms of repayment, including: . . . The amount,
28 uniformity, and frequency of payments." The Court will need to

⁶ Plaintiffs do not base their motion on § 1983.
However, if a violation of the NBA or the Constitution exists, it
can serve as the predicate basis for the assertion of a § 1983
claim.

1 determine whether this regulation conflicts with any portion of
2 § 1748.13, or with the statute in its entirety.⁷

3 Regarding the commerce clause, Congress is empowered to
4 regulate commerce among the several states. U.S. Const. art. I,
5 § 8, cl. 3. Where Congress has not enacted laws concerning
6 issues involving interstate commerce, its commerce power lies
7 dormant. This does not, however, allow states to pass laws that
8 unduly interfere with interstate commerce. The so-called
9 "dormant commerce clause" thus stands for the principle that
10 state laws are unconstitutional if they place an undue burden on
11 interstate commerce.

12 In this case, the applicable test is as follows: When a
13 state law does not discriminate on its face against out-of-state
14 business (which there is no contention here that § 1748.13 does),
15 there is a presumption in favor of upholding the state law. In
16 that circumstance, the test for determining the validity of a
17 state law is to balance the burdens the statute places on
18 interstate commerce against the local benefits. "Where the state
19 regulates even-handedly to effectuate a legitimate local public
20 interest, and its effects on interstate commerce are only
21 incidental, it will be upheld unless the burden imposed on such
22 commerce is clearly excessive in relation to the putative local
23 benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

24 To evaluate the "likelihood of success on the merits" of
25 either the preemption or the dormant commerce clause arguments,

27 ⁷ Plaintiffs allege that other federal statutes, such as
28 the Home Owners' Loan Act, 12 U.S.C. § 1462 et seq., may also
conflict with § 1748.13 in whole or in part.

1 this court must weigh the benefits of California's (purported)
2 new consumer protection law against the burdens and restraints
3 that the law imposes upon credit card issuers. This question
4 requires a highly fact-sensitive analysis. Presently, however,
5 the court finds that the parties have supplied insufficient
6 information for the court to make this analysis.

7 First, plaintiffs have not submitted sufficient information
8 to provide a contextual basis upon which to judge the nature and
9 extent of the burden they assert they face. While plaintiffs
10 have submitted a number of declarations seeking to specify the
11 burdens they will face if this statute goes into effect, the
12 court finds portions of this information to be vague and
13 incomplete. For example, plaintiffs have not made clear which
14 costs they have incurred in seeking to prepare for the
15 implementation of this law and the costs they expect to incur in
16 the future if the law goes into effect. Additionally, some
17 plaintiffs have alleged that they will suffer decreases in
18 revenue if they are not able to place their customary
19 advertisements on the billing statements. With regard to this
20 assertion, the parties have not developed evidence of a causal
21 relationship between the positioning of the advertising and the
22 revenue some declarations claim such positioning generates.
23 Also, plaintiffs provided no evidence of the additional costs of
24 compliance with this statute in comparison to the revenues
25 generated from California. Finally, plaintiffs did not show the
26 costs each element of the statute will force them to bear. This
27 analysis would be particularly relevant should the court decide
28 that portions of the statute are valid while others are not.

1 As for defendants, the State offers little in the way of a
2 detailed description of the benefits that will accrue to the
3 citizens of California. Rather, defendants state that the
4 benefit to the citizens of the State is "self evident" and cite
5 polling data indicating that consumers believe information
6 regarding the extent of time to pay off a credit card would be of
7 use to them. Defs.' Opp'n at 34, 35. Such generalities are of
8 little value when assessing benefits. Under the balancing test
9 contemplated in Pike, defendants need to supply information that
10 addresses the nature and scope of the benefits that will be
11 derived from this statute.

12 The court is keenly aware of the time deadlines involved in
13 this case, and it has considered the delay by plaintiffs in
14 bringing this motion.⁸ Clearly, the failure of plaintiffs to
15 allow sufficient time for both the parties and the court to
16 address all the facts is not an insignificant consideration.
17 However, because the court has serious concerns regarding the
18 validity of at least portions of the statute, it cannot find that
19 plaintiffs' delay prevents an interim stay. Accordingly, as a
20 court of equity under such circumstances, the court must stay the
21 effective date of the statute so that it may make an informed
22 decision on a complete record.

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26 ⁸ Plaintiffs knew of the statute since October 2001 when
27 it was signed; some of the named plaintiffs participated in the
28 legislative process through lobbying efforts. Yet plaintiffs did
not file this lawsuit until May 24, 2002 and did not notice their
motion for hearing until June 28, 2002 (one business day before
the statute was to go into effect).

1 **CONCLUSION**

2 The court finds the record, in its present form,
3 insufficient for the court to reach a decision as to the issuance
4 of a preliminary injunction. In order to address the issues
5 described above and considering the shortness of time that the
6 parties had to present their positions to the court, the
7 court will allow the parties to conduct discovery on issues
8 pertaining to the motion until August 30, 2002. Thereafter,
9 plaintiffs shall file and serve a supplemental opening brief, not
10 to exceed 40 pages in length, addressing the issues described
11 herein and any matters raised in discovery,⁹ on or before
12 September 20, 2002. Defendants shall file and serve an
13 opposition thereto (addressing the same matters), not to exceed
14 50 pages in length, on or before October 11, 2002. Plaintiffs
15 shall file and serve a reply thereto, not to exceed 20 pages in
16 length, on or before October 25, 2002.¹⁰ A continued hearing on
17 the matter will be held on November 8, 2002 at 10:00 a.m. in
18 Courtroom 2.

19 IT IS SO ORDERED.

20 DATED: June 28, 2002

21 _____
22 FRANK C. DAMRELL, Jr.
23 UNITED STATES DISTRICT JUDGE
24

25 ⁹ The court will by subsequent order ask the parties to
26 address specific questions in their supplemental briefing; the
27 questions may also serve to focus the discovery on matters of
particular interest to the court.

28 ¹⁰ The parties are permitted to file declarations in
support of their supplemental briefs.